UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF LOUISIANA

IN RE:

CAJUN ELECTRIC POWER COOPERATIVE, INC. **CIVIL ACTION NO. 94-2763-B2**

Debtor **BANKRUPTCY CASE NO. 94-11474**

REASONS FOR DECISION ON CONFIRMATION OF TRUSTEE'S FOURTH AMENDED AND RESTATED PLAN OF REORGANIZATION

I. INTRODUCTION

Cajun Electric Power Cooperative, Inc. ("Cajun" or "Debtor"), is a not for profit Louisiana electric cooperative corporation that generates and transmits wholesale electric power to its members (individually, "Member", collectively, "Members"). On December 21, 1994 ("Petition Date"), the date this chapter 11 case was filed, Cajun consisted of twelve distribution cooperatives, each being, like Cajun, a not for profit Louisiana electric cooperative[1]. The Members in turn

[1]Dixie Electric Membership Corporation, Valley Electric Membership Corporation, Northeast Louisiana Power Cooperative, Inc., Beauregard Electric Cooperative, Inc., South Louisiana Electric Cooperative Association, Washington-St. Tammany Electric Cooperative, Inc., Concordia Electric Cooperative, Inc. ("Concordia"), Jefferson

supply power to approximately one million individual and commercial customers in rural Louisiana.[2]

On February 11, 1999, the court rendered three separate decisions and numerous orders in this proceeding, including a decision denying confirmation of the two pending plans of reorganization. Those plans were (1) the plan proposed by the chapter 11 trustee, Ralph R. Mabey ("Trustee"), whereby Louisiana Generating, L.L.C.[3] ("LaGen") would purchase Cajun's non-nuclear assets, and (2) the plan proposed jointly by Southwestern Electric Power Company ("SWEPCO") and the Committee of Certain Members[4] ("CCM") pursuant to which SWEPCO would purchase those assets. Those reasons for decision are incorporated herein by reference.

Subsequently, on May 14, 1999, the **TRUSTEE'S FOURTH AMENDED**

Davis Electric Cooperative, Inc., Claiborne Electric Cooperative, Inc. ("Claiborne"), Pointe Coupee Electric Membership Corporation ("Pointe Coupee"), Southwest Louisiana Electric Membership Corporation ("SLEMCO"), and Teche Electric Cooperative, Inc. . After the Petition Date, Teche was acquired by a for-profit utility, Central Louisiana Electric Company.

[2]While Cajun's original mission was to furnish economical and reliable energy to rural customers in Louisiana, Cajun today does have contracts where energy is provided to non-Louisiana users.

[3]LaGen is a Louisiana limited liability company owned 50% by Southern Electric Company ("Southern") and 50% by NRG Energy, Inc. ("NRG").

[4]An unofficial committee consisting of seven members of Cajun Electric Power Cooperative, Inc.

AND RESTATED PLAN OF REORGANIZATION ("Trustee's Plan") and the **JOINT PLAN OF REORGANIZATION FOR CAJUN ELECTRIC POWER COOPERATIVE, INC. SUBMITTED BY THE COMMITTEE OF CERTAIN MEMBERS, SOUTHWESTERN ELECTRIC POWER COMPANY AND WASHINGTON ST. TAMMANY** ("SWEPCO Plan") were filed. On June 11, 1999, the Official Unsecured Creditors Committee ("UCC"), Pointe Coupee, SLEMCO, Concordia, and LaGen signed on as additional proponents of the Trustee's Plan. Based upon this latter act, the Trustee withdrew as a plan proponent on June 23, 1999. Thereafter, the Trustee's Plan became known as and will be referred to herein as the Creditors' Plan.

Hearings on confirmation of the SWEPCO Plan and the Creditors' Plan were held on June 22-25, 1999. At the conclusion of the confirmation hearing, the court announced scheduling deadlines for the filing of final briefs and took the matter under advisement. Along with the confirmation hearing, the court also heard the **TRUSTEE'S OBJECTION TO CLAIMS OF MEMBERS ARISING FROM REJECTION OF ALL-REQUIREMENTS CONTRACTS**, and the **TRUSTEE'S MOTION FOR DETERMINATION UNDER RULE 3013 OF THE PROPER CLASSIFICATION OF MEMBERS' REJECTION DAMAGE CLAIMS**. The court has this day entered separate reasons for decision with regard to those matters, which reasons are also incorporated herein by reference.

The extensive factual background of this case will not be restated as that background was included in several prior decisions by this court and by the Court of Appeals.[5]

II. THE SETTLEMENT AGREEMENT

Pursuant to an Order of Chief District Judge Frank J. Polozola entered in this proceeding on August 18, 1999, virtually all parties in interest in this proceeding attended a settlement conference on August 25, 1999. The conference was also attended by Bankruptcy Judge Steven Felsenthal, Northern District of Texas.[6]

As a result of the conference, a **SETTLEMENT AGREEMENT RELATIVE TO CONFIRMATION OF CREDITORS' PLAN IN CHAPTER 11 CASE OF CAJUN ELECTRIC POWER COOPERATIVE, INC.** ("Settlement Agreement") was approved and executed by the Trustee, the UCC, LaGen, SWEPCO, the United States of America, acting through the

---

[5] See, Matter of Cajun Electric Power Cooperative, Inc., 150 F.3d 503 (5th Cir. 1998); Matter of Cajun Electric Power Cooperative, Inc., 119 F.3d 349 (5th Cir. 1997); Matter of Cajun Electric Power Cooperative, Inc., 109 F.3d 248 (5th Cir. 1997); In re Cajun Elec. Co-op, Inc., 230 B.R. 683 (Bankr. M.D. La. 1999); In re Cajun Elec. Co-op, Inc., 230 B.R. 693 (Bankr. M.D. La. 1999); In re Cajun Elec. Co-op, Inc., 230 B.R. 715 (Bankr. M.D. La. 1999).

[6] Judge Felsenthal, pursuant to an order of this court which appointed him as mediator, attempted to resolve this case through the mediation process. Unfortunately, and notwithstanding the substantial efforts of Judge Felsenthal and the interested parties who participated, this attempt at settlement was not successful.

Rural Utilities Service ("RUS")[7], the Louisiana Public Service Commission ("LPSC")[8], each member of the Fuel Chain[9], Entergy Gulf States, Inc. ("GSU"), each of the 11 member cooperatives of the Debtor (individually, "Member", and collectively, "Members"), and by the CCM. On August 26, 1999, Judge Polozola entered his **ORDER APPROVING SETTLEMENT AGREEMENT RELATIVE TO CONFIRMATION OF CREDITORS' PLAN** ("Order"). Pursuant to the Settlement Agreement, the following agreements were made *inter alia:*

A. Each Member supporting the SWEPCO Plan and the CCM withdrew their support of the SWEPCO Plan and withdrew as co-proponents of the SWEPCO Plan.

---

[7]The Settlement Agreement was signed by Larry A. Belluzzo, a representative of the Administrator of the RUS. Pursuant to appropriate federal statutes and regulations, however, approval of the Settlement Agreement by the RUS is subject to certain formalities.

[8]The Settlement Agreement was signed by Michael Fontham, Special Counsel to the LPSC. The LPSC, being a public body, and due to the Open Meeting Law of the State of Louisiana, could not convene to consider the Settlement Agreement without appropriate notice being given in accordance with Louisiana law.

[9]Cajun's plant in New Roads, Louisiana, is fueled by coal from the Powder River Basin in Montana. The parties who supply the coal and rail and barge services to move this coal to New Roads have been referred to throughout this proceeding as the Fuel Chain, to wit, Western Fuels Association ("Western"), Triton Coal Company ("Triton"), Burlington Northern and Santa Fe Railway ("BN"), and American Commercial Marine Services ("ACMS").

B. SWEPCO withdrew the SWEPCO Plan, with prejudice.

C. The Creditors' Plan, the Asset Purchase Agreement between the Trustee and LaGen, and the power purchase agreements[10] referenced therein shall be amended to implement certain changes, including:

(1) The purchase price is reduced from $1,045,500,000.50 to $1,026,000,000.00.

(2) With reference to the options given to the Members under the Creditors' Plan, certain modifications are to be made to the SWEPCO PSSA.

(3) Expense reimbursement is available to all Members as set forth in detail in the Settlement Agreement.

(4) All opposition, pending motions and/or objections to confirmation of the Creditors' Plan shall be withdrawn and/or dismissed.

(5) On the effective date of the Creditors' Plan, the pending motions to disqualify the Trustee and his counsel, LeBoeuf, Lamb, Greene, & Macrae, LLP, (“Le Boeuf Lamb”), shall be dismissed with prejudice.

(6) If agreed to both by the District Court and the

[10]An integral part of both the Creditors' Plan and the SWEPCO Plan are the long-term power supply agreements proposed to be entered into between LaGen and SWEPCO on the one hand and the Members on the other. These agreements are referred to herein as the “LaGen PSSA” and the “SWEPCO PSSA.”

Bankruptcy Court, the decision in Adversary Proceeding No. 96-1052 shall be vacated and such adversary proceeding and related appeals shall be dismissed with prejudice.

Accordingly, and pursuant to the Settlement Agreement, the SWEPCO Plan has been withdrawn and the court need consider only the confirmability of the Creditors' Plan. Further, and even though all opposition and objection to the Creditors' Plan has been withdrawn, the court must nonetheless determine that the Creditors' Plan satisfies the confirmation standards of section 1129. In making this determination, the court will address those matters raised by the now-withdrawn objections, as the withdrawal of such objections does not make these alleged defects disappear.

III. THE CREDITORS' PLAN

Following denial of confirmation, the Creditors' Plan was significantly amended. That plan, as presently constituted, can be generally summarized in the following respects. The Creditors' Plan now provides for the sale of substantially all of Cajun's non-nuclear assets to LaGen for a cash purchase price of $995 million[11], subject to certain adjustments. In response

[11]By virtue of post-hearing amendments, the purchase price under the Creditors' Plan was raised to $1,045,500,000.50. Under the Settlement Agreement, however, the purchase price has been finally fixed at $1,026,000,000.00.

to the court's ruling in Adversary Proceeding No. 96-1052 regarding the treatment of the All Requirement Contracts ("ARCs"), the Creditors' Plan now provides the Members with 5 options with regard to their power supply options and/or treatment of their ARCs. The Creditors' Plan incorporates individual settlements with the RUS and the several members of the Fuel Chain, which settlements were approved by the court in its prior confirmation decision[12].

Objections to the Creditors' Plan were filed by SWEPCO, CCM, Claiborne, the LPSC, and GSU.[13] Subsequently, however, GSU withdrew its objection to confirmation, and the LPSC stated in its final brief that it no longer objected to confirmation of either plan.

In its prior decision, the court found that the Creditors' Plan satisfied the requirements of section 1129(a), subparagraphs (4), (5), (6), (7), (9), (10), (11), (12), and (13) of the Bankruptcy Code[14]. The Creditors' Plan has not been

---

[12]The approval of the settlements with the members of the Fuel Chain has been appealed by SWEPCO, the CCM, and the LPSC. Pursuant to the Settlement Agreement, however, these appeals will also be dismissed.

[13]Considering that all objections to the Creditors' Plan have been withdrawn, the court, in considering confirmation, will simply refer to the "Objectors" or to the "Objections."

[14]Title 11, United States Code. References herein to Title 11 are shown as "section ____."

amended in any respect which would cause any of these provisions to become an issue at confirmation. Further, and with the sole exception of section 1129(a)(11), no objections to the Creditors' Plan has been filed with respect to these subparagraphs. Accordingly, and based upon the court's prior decision, the court concludes that the Creditors' Plan satisfies sections 1129(a)(4), (a)(5), (a)(6), (a)(7), (a)(9), (a)(10), (a)(12), and (a)(13).

A. Section 1129(a)(1) and (a)(2).

The first two requirements of section 1129(a) are that the plan [section 1129(a)(1)] and the plan proponent [section 1129(a)(2)] comply with all applicable provisions of the Bankruptcy Code.

1. Sections 1122(a) and 1123(a)(4). The Objections suggest that the classification of the Member rejection damage claims violates both sections 1122(a) and 1123(a)(4). This objection addresses the identical subject raised in the **TRUSTEE'S OBJECTION TO CLAIMS OF MEMBERS ARISING FROM REJECTION OF ALL-REQUIREMENTS CONTRACTS**, and **TRUSTEE'S MOTION FOR DETERMINATION UNDER RULE 3013 OF THE PROPER CLASSIFICATION OF MEMBERS' REJECTION DAMAGE CLAIMS.** The court has, this day, entered separate reasons for decision with regard to those matters, holding that the Members will have no rejection damages under

the Creditors' Plan. Accordingly, the Objections based upon the classification of such claims are moot.

2. Section 1123(a)(5). In the event the Creditors' Plan is confirmed and becomes effective, each Member is given one of 5 options with regard to their ARCs and long-term power supply. Specifically, each Member has the option to elect:

(1) to have its ARC rejected and thereafter obtain power in the future from any source it desires (including both LaGen and SWEPCO) and on such terms as it is able to negotiate;[15]

(2) to purchase power from LaGen for the short-term while the Member makes arrangements to obtain long-term power;

(3) to purchase power from LaGen under the long-term power contract proposed by LaGen ("LaGen PSSA") in connection with the Creditors' Plan;

(4) to purchase power from LaGen under the long-term power contract proposed by SWEPCO ("SWEPCO PSSA") in connection with the SWEPCO Plan[16]; or

(5) to have its ARC assumed and assigned to any qualified entity the Member chooses pursuant to sections 365 and 1123.

---

[15]The Creditors' Plan provides that this option is the "default option" in the event any Member fails to elect among the five options.

[16]This option is modified by the Settlement Agreement. However, since such modification is beneficial to the Members, the court need not detail such modification herein.

The Objectors contend the Creditors' Plan provides an inadequate means of implementation as it offers the SWEPCO PSSA with necessary modifications as an option to the Members without detailing the modifications which would be made[17].

Section 1123(a)(5) requires that a plan shall "provide adequate means for the plan's implementation." As shown in paragraph 4 above, one option provided to Members in the Creditors' Plan is for LaGen to sell power under the terms of the SWEPCO PSSA to any Member that so elects. If that election is made, the Creditors' Plan provides that the SWEPCO PSSA will be:

> modified only as necessary to enable such contract to be offered by Generating, including, without limitation, changes to address allocation issues and to incorporate Generating's agreements for the transportation and supply of coal.

Creditors' Plan, p. 15. The court believes that the modification intended by this language relates only to changes necessary to allow the use of the SWEPCO PSSA by LaGen. The modification language only permits conforming changes, and does not impact the substantive bargain represented by the SWEPCO

[17]The objecting parties had previously argued that the language in the Trustee's Plan stating that the prior plan would be reinstated if this court's prior decision is reversed on appeal violated section 1123(a)(5). That option has now been removed from the Creditors' Plan and accordingly, that objection is moot.

PSSA. This concern was also addressed and clarified in the Settlement Agreement. Accordingly, the court finds that this objection is without merit.

3. Section 1104(b). The Objectors contend the Creditors' Plan cannot be confirmed as the original proponent of the plan is not disinterested. On June 7, 1999, SWEPCO filed its **MOTION TO REMOVE RALPH R. MABEY AS CHAPTER 11 TRUSTEE AND TO DISQUALIFY LEBOEUF, LAMB, GREENE, & MACRAE, LLP** ("Motion to Disqualify"). In the Motion to Disqualify, SWEPCO argues that the Trustee is not disinterested due to certain connections between his firm and both NRG and New Century Energy, Inc. Although the Motion to Disqualify was scheduled for hearing in November, the Settlement Agreement will result in the dismissal of the Motion to Disqualify on the effective date of the Creditors' Plan.

Notwithstanding that the Motion to Disqualify is probably now rendered moot, the facts alleged in the Motion to Disqualify would not have resulted in denial of confirmation. Section 1104 relates to the appointment of a trustee, and does not constitute a confirmation requirement. Whether the Trustee and his counsel should be removed and required to disgorge fees is an issue which would have been addressed at the hearing on the Motion to

Disqualify[18] and is separate and apart from confirmation. Further, since the Trustee is no longer a plan proponent, this issue is clearly not relevant to confirmation of the Creditors' Plan.

4. Section 1125. The Objectors also assert that the Disclosure Statement relating to the Creditors' Plan should have disclosed that the Trustee was subject to disqualification and disgorgement of fees. Section 1125 requires, for purposes of confirmation, the disclosure of "adequate information," which is defined as:

> information of a kind, and in sufficient detail, as far is reasonably practicable in light of the nature and history of the debtor and the condition of the debtor's books and records, that would enable a hypothetical reasonable investor typical of holders of claims or interests of the relevant class to make an informed judgment about the plan, but adequate information need not include such information about any other possible or proposed plan.

The court does not believe that the recent disinterestedness issues and the possibility of disqualification and/or disgorgement of fees are the type of information required by section 1125. These issues do not affect either creditors' claims or Members' interest. Further, as noted above, the

[18]While the Motion to Disqualify is to be dismissed, the Settlement Agreement reserves to all parties the right to urge the facts raised therein in connection with fee applications of the Trustee and LeBoeuf Lamb.

withdrawal of the Trustee as a plan proponent renders this issue moot.

B. Section 1129(a)(3).

This section requires that a plan must have been "proposed in good faith and not by any means forbidden by law." Several instances of a lack of good faith were raised by the Objections, namely (1) the disinterestedness of the Trustee and the failure of the Trustee to disclose a possible conflict of interest at an earlier time; (2) the release of claims against the Trustee; (3) the inclusion of the Fuel Chain settlements; and (4) the adoption of the 1999 SWEPCO PSSA. The court will address each of these issues.

The Fifth Circuit has discussed the "good faith" requirement as a confirmation standard:

> Section 1129(a)(3) requires that a debtor's plan be proposed in good faith and not by any means forbidden by law. The requirement of good faith must be viewed in light of the totality of the circumstances surrounding establishment of a Chapter 11 plan, keeping in mind the purpose of the Bankruptcy Code is to give debtors a reasonable opportunity to make a fresh start. In re Sun Country Dev., Inc., 764 F.2d 406, 408 (5th Cir.1985). "Where the plan is proposed with the legitimate and honest purpose to reorganize and has a reasonable hope of success, the good faith requirement of 1129(a)(3) is satisfied." Id. A debtor's plan may satisfy the good faith requirement even though the plan may not be one which the creditors would themselves design and indeed may not be confirmable. In re Brioschi Enter., Ltd., II, 994 F.2d 1160, 1167 (5th Cir.1993).

Financial Security Assurance, Inc. v. T-H New Orleans Limited Partnership (In re T-H New Orleans Limited Partnership), 116 F.3d 790, 802 (5th Cir. 1997).

The foregoing definition of good faith suggests a reorganization in the broadest sense. In the instant case, however, the Creditors' Plan provides for the liquidation of the Debtor. The test of good faith in that instance has a somewhat different slant. See, e.g., In re Jartran, Inc., 886 F.2d 859, 866-870 (7th Cir. 1989). Thus, rather than considering the plan from the perspective of the "fresh start" of the debtor, the test might well be stated as follows:

> "Though the term 'good faith,' as used in section 1129(a)(3), is not defined in the Bankruptcy Code, . . . the term is generally interpreted to mean that there exists 'a reasonable likelihood that the plan will achieve a result consistent with the objectives and purposes of the Bankruptcy Code.' "In re Madison Hotel Assocs., 749 F.2d 410, 424-25 (7th Cir.1984) (citations omitted). "According to the good faith requirement of section 1129(a)(3), the court looks to the debtor's plan and determines, in light of the particular facts and circumstances, whether the plan will fairly achieve a result consistent with the Bankruptcy Code." Id. at 425.

Matter of 203 N. LaSalle Street Partnership, 126 F.3d 955,969 (7th Cir. 1997), rev'd on other grounds, Bank of America Nat. Trust and Sav. Ass'n v. 203 North LaSalle Street Partnership, 119 S.Ct. 1411, 143 L.Ed.2d 607 (1999).

1. Disinterestedness of the Trustee and Related Issues.

Although the court had scheduled hearings on the Motion to Disqualify for a later date, and over the objections of the Trustee and others, the court did allow some evidence on this

matter at the confirmation hearing in order to address the issue of good faith. The Trustee testified at the confirmation hearing regarding the issue of a possible conflict of interest.

On May 14, 1999, LeBoeuf Lamb, counsel for the Trustee, filed its Twelfth Supplemental Disclosure. In that disclosure, LeBoeuf Lamb revealed that the firm also represented NRG in connection with the acquisition of certain assets, and, further, that the firm represented New Century Energy, Inc. ("New Century") in connection with a proposed merger with NRG's parent corporation, Northern States Power.

The Trustee, who is also a member of the LeBoeuf Lamb firm, testified that, although LeBoeuf Lamb does have a rather sophisticated computer conflict checking system, the conflict was not caught by the computer due the failure to enter NRG's name in the database. The Trustee testified that he first became aware that a potential conflict of interest issue existed in January of 1999 and became aware of the firm's representation of New Century some time between January and March of 1999. During that time, he spoke with counsel at his firm in charge of disclosure matters. The Trustee further testified that he left the investigation into the possible conflict and need for disclosure up to his disclosure counsel, and that he did discuss

the matter with them at different times.

Based upon the evidence submitted, the court finds that section 1129(a)(3) is satisfied with respect to this issue. LeBoeuf Lamb is a large firm with offices in various cities across the country. Although LeBoeuf Lamb had a system in place to catch potential conflicts, an obvious mistake was made in this instance. Upon learning of the potential conflict, the Trustee instructed his disclosure counsel to investigate the matter and make appropriate disclosures.

The court does not believe that the disclosure was intentionally withheld or delayed in order to gain any tactical advantage in this case. Further, there is absolutely no evidence that the dual representation was used in any manner to gain an advantage in this case.[19]

2. Release of Claims against the Trustee.

The Objectors claim that the release of the Trustee contained in the Creditors' Plan illustrates bad faith. The court disagrees. Section 11.5(b) of the Creditors' Plan provides that:

---

[19]The conclusion of the court herein regarding lack of disinterestedness on the part of the Trustee and LeBoeuf Lamb shall be deemed to apply only with respect to confirmation of the Creditors' Plan. Whether the circumstances brought forth will affect fees to be allowed the Trustee and LeBoeuf Lamb will be determined at a later date.

> Release of the Trustee. Subject to the occurrence of the Effective Date, an order confirming the Plan shall constitute a release, discharge and forgiveness of all claims, demands or causes of action which Cajun, or the Estate owns, holds or is entitled to prosecute on behalf of any other party against the Trustee, his agents, attorneys or other professionals. This release shall cover all claims or actions, derivative or otherwise, which may be brought in the name of, or behalf of, or in the right of, Cajun, the Estate or the Trustee.

The thrust of the Objection is that the comprehensive release attempts to release the Trustee from the claims raised in the Motion to Disqualify. Even though this argument may be rendered moot by the dismissal of the Motion to Disqualify, the court concludes that the release language would not have had this result. No provision of a plan can affect the court's ability to remove a trustee or award fees. Further, the court does not believe that the Creditors' Plan attempts to provide a release of such claims. Section 3.1(a) of the Creditors' Plan, which is now reinforced by new Section 11.5(e)[20], insures that all fees of the Trustee and his professionals will be subjected

---

[20]Section 11.5(e) of the most recent amendment to the Creditors' Plan provides that:

> Limitation on Release. Notwithstanding subsections (a), (b), and (c) of this Section 11.5, the release granted to the Trustee contained in Section 11.5 shall not release the Trustee or his professionals with respect to matters related to their compensation, which compensation is governed by Section 3.1(a) of the Plan and the provisions of the Bankruptcy Code.

to the process established by the Bankruptcy Code for the allowance and payment of professional fees. Further, the Trustee testified that a release of these possible claims was never intended.

In addition, the court notes that the release of the Trustee was included in the Trustee's Plan in April of 1996 when it was originally filed, has been continuously in such plan, and no previous objection was raised. The court believes that a trustee is, in fact, a customary party to receive a release under a plan of reorganization.[21]

Based upon the foregoing reasons, the court finds that the inclusion in the Creditors' Plan of a release in favor of the Trustee does not constitute bad faith.

3. Inclusion of the Fuel Chain Settlements.

The Creditors' Plan includes provisions relating to the settlement of miscellaneous matters with the individual members of the Fuel Chain. The Objectors suggest this constitutes bad faith, asserting that the Fuel Chain settlements will result in higher prices to consumers. The court disagrees. The

---

[21]See, In re Erie Lackawanna Railway Co., 803 F.2d 881 (6th Cir. 1986)(trustee discharged and released in plan); Schweitzer v. Consolidated Rail Corp., 36 B.R. 469 (Bankr. E.D. Pa. 1984), rev'd on other grounds, 758 F.2d 936 (3d Cir. 1985)(trustee release contained in plan and court enforced broad release); In re Parker-Young Co., 15 F. Supp. 965 (D.N.H. 1936) (plan contained trustee release).

settlements between the Trustee and the Fuel Chain were approved by the court in prior reasons for decision. At that time, the court specifically found that the settlements were not in bad faith and were the result of arm's length bargaining between the parties. The court's approval of the settlements has been appealed to the District Court. Pursuant to the Settlement Agreement, however, the appeals will be dismissed. The court finds that this objection is without merit.

4. Adoption of the 1999 SWEPCO PSSA.

Inclusion of the 1999 SWEPCO PSSA as an option for the Members was also raised as evidence of bad faith. As stated previously, the Creditors' Plan provides 5 options to the Members with regard to their future power supply. One of the options is to obtain power from LaGen under the SWEPCO PSSA. In the midst of the confirmation hearings, and in order to support an increase by SWEPCO in its proposed purchase price, SWEPCO and the Members supporting the SWEPCO Plan agreed to a 1 mil rate increase. Following the SWEPCO amendment, the Creditors' Plan was amended to offer the Members the right to purchase power under the new SWEPCO PSSA rather than the previous edition of the SWEPCO PSSA as previously offered. The argument was made that this amendment could cause a substantial increase in profits to LaGen and does not benefit creditors. The court

rejects this argument.

The new SWEPCO PSSA was agreed to by the Members and represents the most current agreement negotiated between SWEPCO and the CCM. The court finds it disingenuous for a Member to agree to a rate with SWEPCO while at the same time arguing that LaGen's adoption of the same rate under the same terms represents bad faith with respect to the Creditors' Plan.

Nonetheless, this issue was also addressed in the Settlement Agreement, with LaGen agreeing to amend the Creditors' Plan to permit any Member to elect the previously offered SWEPCO PSSA, although the rate would be increased by ½ mil.

C. Section 1129(a)(8)/Section 1129(b).

Although no objection to the Creditors' Plan has been filed with regard to section 1129(a)(8), the court must find that each provision of section 1129(a) is satisfied in order to confirm the Creditors' Plan. Section 1129(a)(8) requires that each impaired class has accepted the plan. The balloting results show that, with the exception of the Member classes, all classes voted in favor of the Creditors' Plan by the required number and dollar amount. Section 1126(c) and (d). As the Member classes have rejected the Creditors' Plan, however, confirmation cannot take place pursuant to section 1129(a).

This failure, however, is not fatal to confirmation, as the

"cramdown" provision of chapter 11, section 1129(b), provides an alternative route to confirmation if all subparagraphs of section 1129(a) are satisfied other than subparagraph (8). To succeed under section 1129(b), the plan must not "discriminate unfairly" and must be "fair and equitable" with respect to the nonaccepting impaired class. Section 1129(b)(1).

Notwithstanding the fact that some of the Members supported each plan, the Creditors' Plan does not discriminate in any way against those Members who previously supported the SWEPCO Plan. Each Member has the same choices for their future power supply under Section 6.1(a) of the Creditors' Plan. Further, the Creditors' Plan provides that any Member who elects to enter into a long-term power supply contract with LaGen is entitled to reimbursement of certain expenses incurred in this proceeding.

Members who have vehemently opposed LaGen during this proceeding may well choose not to acquire their future power from LaGen. If this is this case, that Member will have different treatment under the Creditors' Plan than a Member who signs up with LaGen. This difference in treatment, however, does not constitute
"unfair discrimination," as all Members have identical options under the Creditors' Plan.

Section 1129(b)(2) provides a non-exclusive list of requirements for a plan to be "fair and equitable." With respect to a class of interests, a plan is fair and equitable if "the holder of any interest that is junior" to the dissenting class "will not receive or retain" any property under the plan. Section 1129(b)(2)(C)(ii). The Creditors' Plan has no class junior to that of the Members, and, accordingly, this portion of the cramdown is likewise satisfied.

D. Section 1129(a)(11).

Section 1129(a)(11) provides that a court shall confirm a plan only if the court finds that:

> (11) Confirmation of the plan is not likely to be followed by the liquidation, or the need for further financial reorganization of the debtor or any successor to the debtor under the plan, unless such liquidation or reorganization is proposed in the plan.

This is commonly referred to as the "feasibility test."

A key element of feasibility is whether there exists the reasonable probability that the provisions of the plan can be performed.[22] The purpose of the feasibility test is to protect

---

[22] Clarkson v. Cooke Sales & Serv. Co. (In re Clarkson), 767 F.2d 417, 420 (8th Cir. 1985) ("the feasibility test contemplates 'the probability of actual performance of the provisions of the plan. . . . The test is whether the things which are to be done after confirmation can be done as a practical matter . . . .'") (citing Chase Manhattan Mortgage & Realty Trust v. Bergman (In re Bergman), 585 F.2d 1171, 1179 (2d Cir. 1978)); see also Jorgensen v. Federal Land Bank of Spokane (In re Jorgensen), 66 B.R. 104, 108 (Bankr. 9th Cir. 1986); In re Greene, 57 B.R. 272, 277-78 (Bankr.

against entirely speculative plans. However, just as speculative prospects of success cannot sustain feasibility, speculative prospects of failure cannot defeat feasibility. The mere prospect of financial uncertainty cannot defeat confirmation on feasibility grounds since a guarantee of the future is not required.

On the issue of feasibility in general, the Fifth Circuit stated recently in the case of Matter of T-H New Orleans Limited Partnership, 116 F.3d 790, 801 (5th Cir. 1997):

> Section 1129(a)(11) codifies the feasibility requirement and requires that confirmation of the plan is not likely to be followed by liquidation or the need for further financial reorganization, unless such liquidation or reorganization is proposed in the plan. 11 U.S.C. § 1129(a)(11). To allow confirmation, the bankruptcy court must make a specific finding that the plan as proposed is feasible. In re M & S Assoc., Ltd., 138 B.R. 845, 848 (Bankr. W.D. Tex. 1992). The standard of proof required by the debtor to prove a Chapter 11 plan's feasibility is by a preponderance of the evidence, Brioschi, 994 F.2d at 1165, ...
>
> In determining whether a debtor's Chapter 11 plan of reorganization is feasible, we noted in Brioschi that "the [bankruptcy] court need not require a guarantee of success . . ., [o]nly a reasonable assurance of commercial viability is required." Id. at 1165-66; see also Kane v. Johns-Manville Corp.,

---

S.D. N.Y. 1986); In re Jartran, Inc., 44 B.R. 331, 393 (Bankr. N.D. Ill. 1984) ("The touchstone of feasibility is whether or nor the Debtor emerges from reorganization with reasonable prospects of financial stability and success, and in particular the ability to meet the requirements for capital expenses.").

> 843 F.2d 636 (2nd Cir. 1988). All the bankruptcy court must find is that the plan offer "a reasonable probability of success." In re Landing Assoc., Ltd., 157 B.R. 791, 820 (Bankr. W.D. Tex. 1993).

The Objections suggest that the Creditors' Plan is not feasible for the following reasons: (1) Southern's "put" agreement; (2) Member rejection damage claims; (3) low rate of return; and (4) insufficient load.

1. Southern's Put Agreement.

Southern and NRG each currently own a 50% interest in LaGen. On May 21, 1999, Southern and NRG entered into an agreement regarding Southern's ownership interest. Pursuant to that agreement, either Southern or NRG can decide to have NRG purchase Southern's interest. This agreement was apparently reached because Southern was concerned with the continuing increases in purchase price offered and also because NRG was concerned with Southern's inability to agree to price increases quickly.

The Objectors argue that the ability of Southern to withdraw from LaGen raises concerns regarding NRG's ability to fund the plan. Michael O'Sullivan of NRG testified that LaGen will absolutely put up the purchase price even if Southern withdraws. O'Sullivan testified that NRG has sufficient equity to close the deal and further, if necessary, the financial community has

shown constant interest in taking part in the Cajun deal.[23] No evidence to the contrary was presented. The court finds that the existence of the Southern "put" agreement does not render the plan unfeasible.

2. Member Rejection Damage Claims.

The Objectors argue that if Member claims resulting from rejection of the ARCs exceed $20 million, the plan cannot be confirmed. The court has this day entered its **REASONS FOR DECISION REGARDING TRUSTEE'S OBJECTION TO CLAIMS OF MEMBERS ARISING FROM REJECTION OF ALL-REQUIREMENTS CONTRACTS and TRUSTEE'S MOTION FOR DETERMINATION UNDER RULE 3013 OF THE PROPER CLASSIFICATION OF MEMBERS' REJECTION DAMAGE CLAIMS**, finding that no such rejection damages exist. Those reasons are incorporated herein by reference. Accordingly, this argument is rejected.

3. Rate of Return.

Dr. Michael Yokell, the Trustee's expert economist, indicated a 3.2% rate of return to investors under the Creditors' Plan. The Objectors contend that this is an unusually low rate of return and leaves LaGen with no margin for error. The court rejected this very argument in its prior decision, stating:

The objectors also argue that the Trustee's Plan

[23]Transcript 6/22/99 pp. 92 - 93.

is not financially feasible. The objectors argue that the 3.2% rate of return projected by the Trustee's expert, Dr. Michael Yokell, leaves the plan with no margin for error. Additionally, the objectors argue that Dr. Yokell's analysis does not take into account a loss of load when the ARC's with Claiborne, WST, and Valley expire in year 21 of the 25 year term. The Trustee responds that Dr. Yokell's testimony was conservative, while the objectors argue that Dr. Yokell's projections are overly optimistic based upon faulty assumptions, including the assumption that the Members would increase their respective loads over the next 25 years and that the market costs for wholesale electricity will increase in the next 25 years.

The court finds that the Trustee has satisfied his burden of proving that the plan is financially feasible. While Dr. Yokell testified that LaGen would realize only a rate of return of 3.2% on their equity investment, he emphasized that the financial projections that he made to assess the feasibility of the Trustee's Plan were "conservative." Dr. Yokell's projections show that at each point going forward cash flows are positive. Even based on his conservative financial projections, Dr. Yokell testified that LaGen is "likely to be viable." Dr. Yokell further testified that, in his opinion, "the chance of Southern defaulting on a credit like this is minuscule." Where, as demonstrated by Dr. Yokell's projections, there are positive cash flows going forward at each point, there would be a strong incentive to make any necessary cash infusions to support the already "sunk costs." The CCM, Claiborne, and Enron did not present any credible evidence to rebut Dr. Yokell's testimony.

Claiborne also argues that Dr. Yokell's testimony is based upon the faulty assumption that the market costs for wholesale electricity will increase in the next 25 years. Dr. Yokell did not merely assume that the wholesale market rate for electricity would increase, but rather, through a voluminous, complex and detailed financial model projected the wholesale market rate over the next 25 years.

The CCM also argues that Reorganized Cajun will

> not have sufficient funds to pay its future costs and should be expected to need future reorganization. However, under the Trustee's Plan, Reorganized Cajun is required to charge its members a rate sufficient to meet all of its costs of operation. Thus, whatever Reorganized Cajun's costs are, they will be covered by revenues received under the ARCs.
>
> Claiborne also contends that because it, WST, and Valley have ARCs that expire in 21 years, LaGen will fail at that time because of the loss of load. However, this argument ignores the fact that if these three members do not elect to extend their ARCs for four more years, LaGen will sell the power that it would have sold to them to someone else. Since that power will be sold at the wholesale market rate and Dr. Yokell's projections for years 22 through 25 show that wholesale market rate will be approximately 15 mills per kWh higher than the contract rate, if Claiborne, WST, and Valley decide not to extend their ARCs, LaGen could make more money than it would if these three members had elected to extend their ARCs.
>
> As stated before, a plan proponent is not required to guarantee success to satisfy section 1129(a)(11), but only give a reasonable assurance of commercial viability. Based upon the evidence presented, the court finds that with regard to financial feasibility, the Trustee's Plan offers a reasonable probability of success and therefore satisfies section 1129(a)(11).

In re Cajun Elec. Co-op, Inc., 230 B.R. 715, 747-748 (Bankr. M.D. La. 1999).

Based upon the court's prior ruling, this Objection is rejected.

4. Insufficient Load.

The Objectors finally suggest that the Creditors' Plan is not feasible because only three cooperatives have committed to purchase long-term power from LaGen. The court disagrees. The

court first notes that additional cooperatives may eventually decide to purchase power from LaGen. However, even assuming that only three Members are willing to enter into long-term contracts with LaGen, there is no evidence to indicate that LaGen will not be financially viable.

Mr. O'Sullivan testified that the lack of additional contracts would not be a problem and further that NRG has recently closed several acquisitions which had no long-term contracts. No contrary evidence was presented. The court finds that the Creditors' Plan provides a reasonable assurance of commercial viability as required by Fifth Circuit jurisprudence,[24] and, therefore, satisfies the requirements of section 1129(a)(11).

CONCLUSION

For the foregoing reasons, the court holds that the Creditors' Plan, while not confirmable under section 1129(a), is confirmable under section 1129(b). The court, finding that Creditors' Plan satisfies the requirements of section 1129(b), concludes that the Creditors' Plan should be confirmed. Within 20 days of the entry of these reasons, counsel for the proponents of the Creditors' Plan shall submit a proposed order

[24]Financial Security Assurance, Inc. v. T-H New Orleans Limited Partnership, 116 F.3d 790, 801 (5th Cir. 1997).

of confirmation.

THUS DONE AND SIGNED in Chambers, at Opelousas, Louisiana, this 31st day of August, 1999.

_____
Gerald H. Schiff
United States Bankruptcy Judge